APPENDIX A.

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

KANSAS CITY, MISSOURI,
Plaintiff-Respondent,
vs.
KANSAS CITY TRANSIT, INC.,
Defendant-Appellant.

No. 51544

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE PAUL E. VARDEMAN, JUDGE

(Filed July 11, 1966)

Kansas City Transit, Incorporated, a "street railroad corporation" (RSMo 1959, § 386.020(5) (7)), and its predecessor corporations have operated the public transportation systems, streetcars, trolley cars and now buses, in Kansas City almost without interruption for more than fifty years. In 1917, amended in 1921 while in receivership, Kansas City Transit entered into a written contract with Kansas City and seven railroads and terminal companies for the construction, maintenance and reconstruction of the 23rd Street Viaduct. On June 26, 1964, Kansas City instituted this action against Transit for breach of the contract. Upon the pleadings, stipulations, attached affidavits and exhibits both parties moved for summary judgment. With a record in this posture the circuit court found that there was no genuine issue as to any material fact, that Kansas City was entitled to judgment as a matter of law and accordingly entered judgment in its favor for $668,870.38 and Transit has appealed claiming that it is no longer legally bound by the contract and that this court should reverse the judgment and enter a summary judgment in its favor.

Related if not connected contracts, some of them involving other viaducts and other parties as well as some of Transit's predecessors, are all fully set forth together with detailed facts and historical background in Kansas City v. Kansas City Terminal Railway Co., (1930) 324 Mo. 882, 25 S.W.2d 1055, Bowers v. Kansas City Public Service Co., (1931) 328 Mo. 770, 41 S.W.2d 810, and more recently Kansas City Terminal Ry. Co. v. Kansas City Transit, (1961) Mo.App., 350 S.W.2d 828, overruled by this court en banc Kansas City Terminal Ry. Co. v. Kansas City Transit, (1962) 359 S.W.2d 698, (Certiorari denied 371 U.S. 968, 83 S.Ct. 551, 9 L.Ed.2d 539), and Union Pacific Railroad Co. v. Kansas City Transit Co., (1966) Mo.App., 401 S.W.2d 528.

Insofar as material here the contract of July 31, 1917, between the city, the railroads and Transit's predecessor, provided for the construction of the 23rd Street Viaduct at an approximate cost of $602,703.00. The viaduct was to be constructed over the tracks of the several railroads and of course was to be used by Transit "for the operation of its streetcars over the same." Each of the three contracting parties, the city, Transit and the railroads, were to contribute to the original cost of construction one-third of the contract price, Transit's third being estimated at $200,921.00. There were detailed specifications but of the greatest significance, in addition to the provisions as to original construction and cost, are these provisions relating to ownership, use, maintenance, reconstruction and other costs or expenditures:

> "12. USED BY STREET RAILWAY (Transit): The Kansas City Railways Company (Transit), its successors and assigns, may use the Main Viaduct and the 'Wyoming Street Approach' thereto for its double track electric street railway, *subject to the provisions of its*

franchise with the City, under Ordinance Number 20140, approved June 15, 1914, *and amendments thereof,"*

* * *

"14. MAINTENANCE. *The viaduct* and its approaches, when completed, and the easements therefor, *shall be the property of Kansas City,* Missouri, *as and for a public highway,* and Kansas City shall be responsible for maintaining and lighting said structure and its approaches and keeping them in repair; *but each of the parties hereto * * * shall contribute to the cost of such maintenance, repairs or the reconstruction thereof, * * *."*

* * *

"If, at any time, such viaduct or its approaches *needs repairing or reconstructing, Kansas City shall proceed at once, to make such repairs or do such reconstructing,* and when finished, it shall render an itemized statement thereof to each of the parties hereto, *and * * * each party shall pay to Kansas City its share of such maintenance, repairs or reconstruction * * *."*

Separately and additionally Transit's predecessor agreed that:

"The streetcar tracks and the necessary equipment thereof on said viaduct or its approaches, shall be maintained by the Kansas City Railways Company, its successors or assigns, without cost to Kansas City or to the other parties contributing to the cost of said viaduct and approaches."

In 1921, with the approval of the United States District Court, the appellant's receivers entered into a supplemental agreement with the railroads and the city "For The Completion Of The Twenty-Third Street Viaduct." Again insofar as material here that additional contract contains these provisions:

"—and with such modifications as would better secure to the Kansas City Railways Company * * * *the use, control and occupancy of that portion of the main viaduct designed and constructed exclusively for street railway traffic* * * * and with such modifications *as would prevent the use by other street railways of such* portion of the main viaduct * * *."

* * *

"—and upon the aforesaid payments being made, and the balance of said obligation paid in full * * * the Kansas City Railways Company * * * *shall have the exclusive use and occupancy of the space set apart for streetcars on the main viaduct* * * * *to the exclusion of all other streetcars for its or their modern double track electric street railroad* * * *."

* *

"And *Kansas City,* Missouri, hereby *agrees that it will not permit any other persons or companies to use said viaduct and approach, or any part thereof, for the operation of streetcars thereon* * * * nor permit such use in such a manner, or to such an extent as to unreasonably interfere with the use thereof by the Receivers * * *."

* *

"(3) Maintenance: It is further agreed that the said *Receivers,* their successors, The Kansas City Railways Company, its successors * * * *shall be obligated to keep and perform all of the obligations to be kept and performed by the Kansas City Railways Company,* its successors, * * * *under Clause 14 of the contract dated July 31, 1917, relating to maintenance, repairs and reconstruction of said viaduct and its approaches."*

The parties carried out, performed and operated under this original contract over the years, the 23rd Street Viaduct was completed, Transit's streetcar tracks were installed on the designated area and all payments were made

by the parties as stipulated. Other facts, particularly those noted by the appellant in its brief, are that on November 1, 1937, the city passed an ordinance authorizing Transit to install and use "trolley bus and motor bus lines for existing facilities." In 1948 and 1950 the city passed ordinances authorizing Transit to substitute buses for streetcars on 12th and 18th Streets and their viaducts, appellant repeatedly says "Transit accepted this ordinance." In 1948 Transit was permitted to surrender its trackage to the city, including that over the 23rd Street Viaduct, for which it paid the city $70,000 "for rehabilitating street" and to substitute bus service. After the 1951 flood service was interrupted for making "alterations," raising a portion of the viaduct "as determined" by the United States Corps of Army Engineers. The cost of that particular job was $113,112.64 and when Transit refused to pay its one-third the city petitioned the Public Service Commission of Missouri for an order approving the alteration and "apportioning the costs." But as to Transit and this phase of the matter the Public Service Commission had no jurisdiction and so could only allocate the costs between the railroads and the city. As to Transit the commission said, "If Public Service is liable for any of the costs *its liability would result from its contracts* and operations pertaining to the viaduct, *and liability therefor, if any, would not come under the jurisdiction of the Commission.*" Re 23rd Street Viaduct, Kansas City, Mo., 6 P.S.C.R. (N.S.) 669, 676. Since 1954 and Transit's refusal to pay one-third of a $39,000 repair bill the parties have stipulated or agreed by ordinance, according to the petition in this case, to continue Transit's services and facilities and "neither party waived its right under the original contract for repairs." One other incidental matter should be noted, in 1961, when Transit became an integrated and diversified company and petitioned the Public Service Commission "for authority

to effect a corporate reorganization and merger" it set forth its certificate of convenience and necessity to operate a "street railroad" in Kansas City, it set forth the orders permitting it "to convert its transit system completely to motor bus operation," it set out the "retirement" of streetcar tracks and specifically pledged that "as a result of the reorganization plan and merger, transit service will continue to be provided in the Greater Kansas City area under a strengthened corporate structure ultimately to the benefit of all concerned, including the public." These matters were all noted in the commission's order of approval along with Transit's assumption of "all liabilities and obligations."

And now giving rise to the immediate litigation, by 1960 the 23rd Street Viaduct "became in dangerous condition and required extensive repairs" and Kansas City and the railroads, after the appropriate preliminary proceedings, applied to the Public Service Commission for an apportionment of cost and permission for "repair and reconstruction" of the viaduct, Transit not joining or appearing. And after a full finding of facts the commission gave its authorization, the viaduct work was completed and in accordance with the original contract Kansas City and the railroads paid the cost of $2,006,611.15 and billed Transit "in connection with the rehabilitation" for its one-third share $668,870.38 and upon its refusal to pay instituted this action.

One of appellant Transit's assignments of error was authoritatively disposed of in 1929 and requires but brief consideration here, that is the contention that "a construction of the contracts that would still impose the burden on Transit to contribute toward the maintenance, reconstruction, or repairs of the 23rd Street Viaduct would amount to a violation of the constitutional safeguards guaranteed" by the 14th Amendment and Art. 1, Sec. 8, clause 3 of the

Constitution of the United States, the due process, equal protection and interstate commerce clauses. But in the 1920s one of the parties refused to build its part of the Oak Street Viaduct and this court en banc, Kansas City v. Kansas City Terminal Railway Company, 324 Mo. 882, 25 S.W.2d 1055, in a suit to compel construction, had this to say, l.c. 907, 915, 916 (25 S.W.2d l.c. 1066, 1070):

> "The city having fully performed the contract on its part had, and has, a vested right to performance on the part of the Company."
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> * * *
>
> "Neither insolvency nor the difficulty attendant upon the borrowing of money with which to perform constitutes a defense to an action to enforce a contract, unless made so by the contract itself. It is not a defense in this case. Nor does the claim, that if the defendant be required to discharge a valid obligation entered into by it for the purpose of acquiring in part its railroad property, such requirements will burden interstate commerce in violation of the commerce clause of the Constitution of the United States, merit serious consideration."

As to the specifically briefed claim that enforcement of the obligation deprived Transit "of its property without due process of law and deprives it of the equal protection of the law" the court said:

> "This is a suit to compel the specific performance of a contract. The contract is a valid one; the parties to it were competent; the performance sought falls clearly within its terms and intent. Its enforcement as against defendant cannot in reason violate any constitutional right."

Invoking two auxiliary rules of construction, one, "that where a contract is fairly and reasonably open to two constructions, one making it legal and the other illegal, the

former must be adopted" (Wiggins Ferry Co. v. C. & A. Ry. Co., 128 Mo. 224, 245, 27 S.W. 568, 571, 30 S.W. 430), and two, that the laws in existence, including city ordinances, when the contract was executed became a part of the contract (1 Restatement, Contracts, Sec. 236(a)), the appellant contends that it once had an exclusive right to operate streetcars over the viaduct and since other bus companies now also have that right and operate over the viaduct its exclusive right to use has been destroyed and therefore it is said that the circuit court erroneously concluded it was now bound to perform its contract obligations. Specifically, this is its assignment of error, urged in connection with the interstate commerce clause and the auxiliary rules: "The 1917 agreement as amended in 1921 required Transit to pay maintenance costs only while it had an exclusive right to operate streetcars over the viaduct. The court erred in entering a judgment against Transit for maintenance costs incurred after Transit no longer had an exclusive right to operate buses over the viaduct." Briefed as a separate point but in fact in this very connection appellant Transit contends that the cases of Kansas City Terminal Ry. Co. v. Kansas City Transit, by this court en banc (359 S.W.2d 698), and Union Pacific Railroad Co. v. Kansas City Transit Co., by the Kansas City Court of Appeals (401 S.W.2d 528), especially insofar as the former construes "use" "in another contract under an ordinance and is not compelling authority for a decision in this case holding that streetcars are buses under the 1917 agreement as amended, and therefore the court erred in entering judgment against Transit based upon that decision."

The appellant points only to the 23rd Street Viaduct and of course the viaduct and its contract comprise the subject matter of this litigation and it is assumed that for

its franchise purposes Transit has the right to an exclusive use of the viaduct. Nevertheless, as it repeatedly recited in its latest plan of reorganization, the appellant has a franchise from Kansas City to operate as a common carrier of passengers in the greater Kansas City area. That franchise is for a number of years and the appellant does not claim that any other common carrier is operating in competition with it or that Kansas City has permitted an infringement of its franchise rights and it does not propose in this proceeding, even if it were possible, to surrender or modify its franchise rights. The appellant is a "street railroad corporation" and its franchise is for a "street railroad" which includes "by whatsoever type of power operated" and "by whatsoever type of vehicle operated, for public use in the conveyance of persons or property for compensation." RSMo 1959, § 386.020(5) (7). While Transit built and maintained its tracks and operated streetcars, as the contract provided, its use of that part of the viaduct was indeed "exclusive" but it was no doubt to its franchise advantage to surrender its tracks and that space to the city and to substitute buses for streetcars. And when it voluntarily made the substitution it necessarily used the viaduct in common with all other vehicular traffic including other types of common carriers of both persons and freight but not upon this record in derogation or infringement of its franchise rights.

In any event upon all the essential issues this case is governed and controlled by the opinions in Kansas City Terminal Co. v. Kansas City Transit Co., 359 S.W.2d 698, and Union Pacific R. Co. v. Kansas City Transit Co., 401 S.W.2d 528. The appellant contends that the Kansas City Terminal case is distinguishable in that "the railroads did not agree that Transit would have an 'exclusive use.' The city in our case did agree that Transit's use would be ex-

clusive and therefore when its use became nonexclusive, the contract was breached and terminated and Transit's obligation to maintain ceased." But, as indicated, upon this record Transit yet enjoys its exclusive franchise use not only of the streets and highways in the city but as well of this and other viaducts. In addition, in the Terminal case the court of appeals, upon the appellant's urging, held that "streetcars and streetcar lines" in the contract did not mean "buses" and that therefore when Transit was permitted to substitute bus service for streetcar service it was no longer bound by its contract with the railroads "to participate in the costs incurred by the latter in construction and maintaining public-thoroughfare viaducts." 350 S.W.2d l.c. 829-830. The case was transferred and the court en banc not only overruled the court of appeals but by necessary implication if not directly disposed of Transit's contentions here. Material here, the court said, 359 S.W.2d l.c. 704:

> "Thus Transit was required to assume the same status as Terminal as to paying the cost of building the viaducts and subways and their approaches, including the land cost. Therefore, it was contemplated that Transit and Terminal should participate in this enterprise on the same cost basis. However, Transit was given a way out of its obligation for maintenance because that obligation was for 'the period of such use.' * * * The decisive issue is: What 'use' was meant? Transit is still using the viaducts and subways * * * for 'transportation of metropolitan passengers as a common carrier in intrastate and interstate commerce.' It is our view that this was the use originally contemplated although the motive power and type of vehicle has changed * * *."
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> * * *
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> "The obligation to pay was unequivocal and unconditional. Although elsewhere therein the right to

put tracks on the station plaza was stated and the obligation to pave around tracks on viaducts and in subways provided, the obligation for the cost of future maintenance as well as the cost of building the new structures was stated unconditionally without regard to how they were to be used by Transit."

* * *

"Our view as to the reasonable construction of the agreement (based on the ordinances and contract) considered as a whole is that the maintenance obligation continues as long as Transit continues to use the viaducts and subways for its business of surface transportation of passengers over them regardless of the kind of motive power and vehicles used for that purpose."

When the railroads enforced Transit's obligation to contribute to the repairing of another viaduct the court of appeals in Union Pacific Railroad Co. v. Kansas City Transit Co., 401 S.W.2d 528, l.c. 536, applied and followed the Terminal case adding, material here:

"There has been no failure or lapse of consideration to excuse Transit from performing its contract obligations. * * * It is the law that when a contracting party has fully performed its contract obligations it thereby acquires *a vested right* to performance by the other party in accordance with the contract terms."

* * *

"The change of condition resulting from Transit's abandonment of streetcars and its use of motor buses instead did not affect Union Pacific's vested right to performance by Transit. It is of no consequence that Transit thereafter derived no utility from the abandoned tracks."

As suggested by appellant those were railroad cases involving separate contracts but all of these contracts are ob-

viously a part of a larger single plan and purpose, as suggested in the Terminal case, "the surface transportation of passengers" by a franchised "street railroad corporation" in the greater Kansas City area and there is no more reason for not enforcing this contract in favor of the city than there was for not enforcing the other contracts for the railroads. Kansas City v. Kansas City Terminal Railway Co.; Kansas City Terminal Ry. Co. v. Kansas City Transit; Union Pacific Railroad Co. v. Kansas City Transit Co., supra.

The appellant's final claim is that this action is barred by the ten-year statute of limitations, RSMo 1959, § 516.110. But in order to make the claim appellant invokes the doctrine of anticipatory breach of contracts (1. Restatement, Contracts, Sec. 318) and the rule in certain employment contracts (Baron v. Kurn, 349 Mo. 1202, 164 S.W.2d 310, 142 A.L.R. 787) and contends, since it breached the contract by denying liability for its obligations in 1954, it is not liable in damages for the breach for which recovery is sought in this suit instituted June 26, 1964. To support an anticipatory breach Transit says that when, on April 2, 1954, the city claimed that it was liable for one-third the cost of certain other repairs and it then denied liability it thereby started the running of the statute of limitations: "In our case, Transit failed to pay the installment due for maintenance and denied liability for repairs. Transit took the position that it had no obligation to pay maintenance costs since buses were not streetcars and a non-exclusive use is not an exclusive use." Thus it is said that this refusal to pay in 1954, together with its denial of liability at that time, was a total breach of the contract, an anticipatory breach, and that therefore this action instituted more than ten years later was barred by the statute of limitations.

The contention as a whole is somewhat disingenuous, the city is not asserting a right to institute and maintain an action on the theory of Transit's anticipatory breach, on the contrary the appellant is claiming that by its own conduct in refusing to observe its contractual obligations some years ago, it set in operation the statute of limitations. Among other authorities the appellant relies on the rule set forth in Sec. 318, Restatement, Contracts, unmindful, apparently of Sec. 322: "If no action on an anticipatory breach is brought before the time fixed by the contract for the beginning of performance by the party who has committed such a breach, the period of the Statute of Limitations begins to run only from the time so fixed by the contract." Or as the commentary to rule 318 states on page 477: "So likewise, if no action is brought, the Statute of Limitations will not run on the right of the injured party from the time of the repudiation but only from the time when there is a failure to perform a promise (Sec. 322)." The rationale of Baron v. Kurn, supra, is explained in its annotation "that in such case the employee's cause of action is for his wrongful discharge which accrues as one cause of action at the time of the discharge and against which the statute of limitations commences to run from that time, and not for wrongful failure to restore him to his job, which, assuming that the employer and employee relationship is not terminated by a discharge in fact, gives rise to successive causes of action as long as it continues, and therefore, the causes of action which accrue within the limitation period are not subject to its bar." Annotation 142 A.L.R. 797, 798-799.

Perhaps, as the respondent suggests, a complete and ready answer to the appellant's contention lies in the very plain language of the statute itself: "Civil actions * * * can only be commenced within the periods prescribed in

the following sections, after the causes of action shall have accrued; provided, that for the purposes of sections 516.100 to 516.370, *the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment,* and, if more than one item of damage, then the last item * * *." RSMo 1959, § 516.010. As applied to this action and the appellant's reliance on the doctrine of anticipatory breach, the statute is self-explanatory (Rippe v. Sutter, Mo., 292 S.W.2d 86) and if the contract is to be construed as providing for a series of installments suit was appropriately instituted within ten years of the accrual of the last installment. Sabine v. Leonard, Mo., 322 S.W.2d 831.

In its reply brief the appellant has attached an exhibit from the April 1955 hearing in the 23rd Street Viaduct case before the Public Service Commission, also a series of letters to and from Transit's predecessor (also said to be exhibits in the case before the commission), including its then counsel's opinion as to certain legal questions. The respondent has filed a motion to strike these fifteen pages from the appellant's brief for the reasons that they "are not a part of the record in this case," were not before and were not presented to the trial court, and are not matters of which this court may take judicial notice. It is not necessary to consider the motion and suggestions in detail, this of course is not the proper and orderly manner of perfecting and presenting a record and appeal in this court. However, this was a court-tried case and the Public Service Commission's official report has been judicially noted (State v. Public Service Commission, Mo., 291 S.W.2d 95), and inadmissible evidentiary matters have been ignored (Civil Rule 73.01(d); RSMo 1959, § 510.310),

and in these particular circumstances the motion to strike is overruled.

And for the indicated reasons the judgment is affirmed.

Paul W. Barrett, Commissioner.

Stockard, C. Concurs
Pritchard, C.—Not sitting

PER CURIAM: The foregoing opinion by Barrett, C., is adopted as the opinion of the court.

All of the Judges Concur.

APPENDIX B.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

KANSAS CITY, a Municipal Corporation,
Plaintiff,
vs.
KANSAS CITY TRANSIT, INC.,
Defendant.
No. 661,437

Order

Now on this 1st day of June, 1965, both of the parties having heretofore filed their motions for summary judgment, and the Court having fully considered the pleadings, affidavits, stipulation of the parties, and exhibits, finds that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law, and that plaintiff's motion for summary judgment should be sustained.

The Court further finds that defendant's motion for summary judgment should be overruled.

WHEREFORE, IT IS BY THE COURT ORDERED, ADJUDGED, AND DECREED that defendant's motion for summary judgment be and the same is hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's motion for summary judgment be and the same is hereby sustained. Judgment is entered in favor of the plaintiff and against defendant in the sum of $668,870.38, together with its costs, and that plaintiff have execution therefor.

/s/ Paul E. Vardeman
Judge

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY

KANSAS CITY, a Municipal Corporation,
Plaintiff,
vs.
KANSAS CITY TRANSIT, INC.,
Defendant.
No. 661,437

Memorandum Opinion

This is a contract action wherein the City of Kansas City seeks to recover $668,870.38 from defendant, Transit Company, as defendant's share of the cost of repairs to the Twenty-Third Street Viaduct.

Both plaintiff and defendant have moved for summary judgment based upon pleadings, affidavits, exhibits, and a stipulation of facts.

From the pleadings and supporting documents, it appears that on July 31, 1917, the City and defendant's predecessor company, the Kansas City Railways Company, entered into the agreement which is the subject of this litigation. By that contract, Transit's predecessor and the City agreed to contribute one-third of the construction cost of the Twenty-third Street Viaduct. The remaining one-third was to be borne by various railroads operating their lines under the viaduct. Paragraph 14 of the contract which is the basis for plaintiff's claim here provides that costs of repair, reconstruction or maintenance shall be borne in the same manner, that is, one-third each by City, Transit and railroads. That paragraph further provides that: "If, at any time, such viaduct or its approaches needs repairing or

reconstructing, Kansas City shall proceed at once, to make such repairs or do such reconstructing, and when finished, it shall render an itemized statement thereof to each of the parties hereto . . . . their successors or assigns, and the amount thereof each should pay under the divisions agreed upon in this contract; each party shall pay to Kansas City its share of such maintenance, repairs, or reconstruction so rendered to it by Kansas City within 30 days thereafter."

In 1921 defendant's predecessor, Kansas City Railways Company, went into receivership, and the 1917 contract was partially modified with approval of the United States District Court, but the obligations created by Paragraph 14 were expressly reaffirmed by Kansas City Railways (Plf's Ex. 2, p. 7).

Following construction of the viaduct, defendant and its predecessor companies operated streetcar lines over the facility until 1948, at which time buses were substituted in part, and in 1950 all streetcar operation was discontinued, being completely replaced by buses.

By 1954 the viaduct was in need of repair. Repairs were performed by the City, but Transit refused to contribute its share of the cost thereof. The Public Service Commission refused to force Transit to contribute on the ground that any obligation was contractual and beyond the Commission's jurisdiction.

Extensive repairs to the viaduct were commenced in 1960 at a total cost of $2,006,611.15. On October 16, 1963, City demanded reimbursement from Transit for its proportionate share of these repairs in the amount of $668,870.38 (Plf's Ex. 8). Transit refused payment (Plf's Ex. 9) and this lawsuit followed.

The present defendant, Kansas City Transit, Inc., is the successor in interest to the Kansas City Railways Com-

pany, the original contracting party, and has assumed the liabilities and obligations of the original company.

Defendant claims it is entitled to summary judgment in its favor because:

1. The Statute of Limitations has run.

2. Under Kansas City Terminal Railway Company v. Kansas City Transit, 359 S.W.2d, 698, defendant is not obligated to contribute to the cost of repairs.

3. Under the 1917 and 1921 contracts defendant is not obligated to contribute to the cost of repairs.

4. To enforce the contracts would violate defendant's rights under the Federal and State Constitutions.

Plaintiff simply claims that there is no genuine issue of any material fact, and that it is entitled to judgment as a matter of law.

Since there is no factual dispute, and since the pleadings and other documents on file are sufficient to render summary judgment pursuant to Civil Rule 74.04, the Court can and will enter judgment based upon the matters appearing of record.

Defendant's first claim on its motion for summary judgment is that the Statute of Limitations ran on this cause of action prior to the institution of this suit. Defendant maintains that because the City passed Ordinance No. 17692 on April 2, 1954, and in said ordinance stated that Kansas City Public Service Company (Defendant's predecessor) has denied liability under the 1917 contract, that the cause of action accrued at that time; and assuming the ten-year statute to be applicable, the statute ran April 2, 1964, which would be prior to the institution of this suit, suit having been filed June 26, 1964. Defendant's position

is that since the contract was repudiated by it in 1954, suit could have been maintained for the breach of the contract any time after April 2, 1954.

The express language of Section 516.100, RSMo., 1959, provides that a cause of action shall not be deemed to accrue *when a wrong is done or the technical breach of contract occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment.* Clearly, on April 2, 1954, the date defendant alleges the cause of action accrued, the work for which recovery is sought in this action had not yet been started, nor had it probably even been contemplated. The work for which recovery is sought here was not started until 1960 and completed in 1963. While it may be that the Statute of Limitations has expired for recovery by the City on work done in 1954, that work was separate and apart from the extensive repairs commenced in 1960. To hold that the Statute of Limitations barred recovery for the subsequent repair work, which is the subject of this suit, would preclude a party from ever changing its position or retreating from a legal position which it might find to be untenable. For example, while the defendant, Transit Company, might have declined payment on the 1954 repairs and might have denied liability therefor (as it apparently did), there is no basis to say that it might not thereafter reconsider its position and assume liability under the contract on some subsequent repair.

The contract in Paragraph 14, sub-paragraph 3, sets out the procedure whereby demand shall be made upon a contributing party under the agreement. It provides therein that the City shall proceed with the work, and upon completion shall bill to the respective contracting parties such amount as each party shall pay. In the case at bar, the bill was submitted and demand made upon defendant

on October 16, 1963. It was not until after the demand had been made that defendant could refuse its obligation and the damages were ascertained. It was not until that time that the Statute of Limitations began to run, and this action was timely instituted whether the five or ten year Statute applies. *Rippe* v. *Sutter*, 292 S.W.2d 86.

Defendant also contends that it is under no obligation to pay for repairs because of the Supreme Court ruling in *Kansas City Terminal Railway Company* v. *Kansas City Transit*, 359 S.W.2d 698, and that the 1917 and 1921 contracts are no longer binding because of changed conditions.

All of the arguments advanced by the defendant, Transit Company, here, and as a matter of fact, many of the cases cited in defendant's brief filed in this court were urged and the cases therein were cited to the Supreme Court in the Terminal Railway case. The arguments to the effect that a bus is not a streetcar, and that because the contract in the Terminal case and the facts and circumstances surrounding its execution were made at a time when it contemplated the continued use of streetcars were not persuasive upon the Supreme Court, and they are not persuasive upon this Court. The fact is that the defendant has continued to use the viaduct for the operation of its buses which are no more and no less than the same use being made of the viaduct at the time the defendant was operating streetcars. While the propelling force of defendant's vehicles has been changed and modernized, the operation over the viaduct by its vehicles has not. Furthermore, the parties agreed that defendant could substitute buses for streetcars without any modification of the obligations imposed by the 1917 contract. (Plf's Exs. 12 and 13)

It seems to me that under the ruling of the Supreme Court in the Terminal Railway case, which involved a similar contract made in 1917, it is clear that the defendant

herein is obligated to the City to pay its proportionate share of the cost of repairs under this contract.

The argument of the defendant to the effect that its constitutional rights are impaired, overlooks the fact that this is simply a suit to enforce a contract voluntarily made by the parties.

Ordinance 31,403 (Deft's Ex. A) which is alleged to violate defendant's Constitutional rights merely approves on behalf of the City the contract already entered into by City and defendant's predecessor. There is nothing in the record to show that the 1917 contract was coerced by the City; on the contrary, the contract was voluntarily made by the parties for their mutual benefit. There is nothing coercive about its continued operation.

While the continued operation of the contract may impose a financial burden on defendant, it does not discriminate against this defendant as opposed to other members of the same class. It is doubtful that the other carriers mentioned by defendant are in the same category as Transit, but even if they are, this is an action on a contract voluntarily executed by the parties. See *Kansas City Terminal Railway Company* v. *Kansas City Transit, supra,* l.c. 706.

The City's motion for summary judgment incorporates by reference, stipulation, affidavits, and exhibits, which conclusively show that plaintiff is entitled to recover under the contract one-third of the cost of repairs of the viaduct from this defendant. Accordingly, since it appears that there is no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law, defendant's motion for summary judgment will be overruled, and plaintiff's motion for summary judgment will be sustained, and judgment will be entered in favor of plaintiff and against defendant in the sum of $668,870.38.

APPENDIX C.

In the matter of the application of Kansas City, Missouri, for an order approving the alteration of an overhead crossing known as TWENTY-THIRD STREET VIADUCT and apportioning the costs thereof.

6 Mo. P.S.C. (N.S.) 669 (1956)

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

On March 22, 1955, an application was filed by Kansas City, Missouri, requesting an Order of this Commission approving the alteration of an overhead crossing known as Twenty-Third Street Viaduct and apportioning the costs thereof. The application requests that Kansas City Public Service Company, Kansas City Terminal Railway Company, St. Louis-San Francisco Railway Company, The Atchison, Topeka & Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company and Kansas City Connecting Railroad Company (sometimes hereinafter referred to as "Public Service", "Terminal", "Frisco", "Santa Fe," "Burlington" and "Connecting Railroad", respectively), be made parties to this proceeding. On said date the Commission issued its Order making all of the above named companies parties to this proceeding and directing them to file Answers to the application, and thereafter all of said parties filed Answers. The matter was originally set for hearing on July 12, 1955, but the date for the hearing was changed from time to time and formal hearing was held at Jefferson City, Missouri, on November 1 and 2, 1955, notice being given to all interested parties. Appearances were as above noted.

Findings of Fact

The Viaduct and approaches in question were first constructed between the years 1917 and 1921 at a cost in excess of $900,000, such costs being borne one-third by Kansas City, one-third by six railroads crossed by the Viaduct (the Kansas City, Fort Scott & Memphis Railway Company is now a part of the St. Louis-San Francisco Railway Company), and one-third by the Kansas City Railways Company. The final payment of the Kansas City Railways Company was made by its receivers pursuant to a court order. The original cost was divided as aforesaid pursuant to the terms of a contract between the parties dated July 31, 1917.

The Kansas City Public Service Company acquired from the receiver of the Kansas City Railways Company the property of that Company, including its rights in and to the Twenty-Third Street Viaduct. The Viaduct crosses overhead the tracks and rights-of-way of the five aforementioned railroad companies. Public Service operated streetcars over the Viaduct in question from the time it purchased the property in 1926 until September 1950. Thereafter, it operated motorbuses and trolley buses over said Viaduct and its approaches until February 1, 1954, when same was closed for alterations. After a flood in 1951 the United States Corps of Army Engineers determined to raise the level of the bridge over the Kansas River and said bridge was raised five or six feet. As a result thereof, it became necessary to raise the Twenty-Third Street Viaduct at the point where it joined the bridge. The alterations of the Viaduct necessitated work in raising a portion of the Viaduct extending for a distance of about 200 feet east from the point where the Viaduct joined the bridge. The cost of this particular alteration was $113,112.64, which amount was paid by Kansas City as pro-

vided in the agreement heretofore mentioned. The Viaduct in question was closed in February, 1954, for the purpose of making such alterations. Upon completion of the work Public Service refused to resume operation of motorbuses over the structure and refused to contribute any portion of the cost of such alteration of the Viaduct. Thereafter, Kansas City and Public Service entered into an agreement or stipulation on September 3, 1954, proviging for resumption of motorbus service over the strueture with the provision that such resumption of service should not be deemed as an admission by the Company of any obligation of the Company to pay one-third of the cost of altering the Viaduct nor as a waiver of any of its rights with respect thereto. Likewise, it was agreed that the City would not admit the correctness of Public Service's contention nor would the City waive any of its rights. The final two streetcar lines operating over the Viaduct were discontinued in 1948 and 1950 respectively. When the Viaduct was reconstructed as aforesaid the paved roadway was extended over the space of the Viaduct which was originally available for use in streetcar service, so that the full width of the section of the Viaduct has since been used for vehicular traffic only. After reconstruction of the Viaduct same was opened for traffic in September 1954 and Public Service at the request of the City operated motorbuses over same.

City's Exhibit 1 shows the location of the Viaduct with reference to Kansas City. City's Exhibits 2A and 2B show the general plan of the Viaduct. City's Exhibit 2C shows a cross section of the main Viaduct and two other sections showing the Wyoming Street approach and the Frisco yards approach. City's Exhibit 3 is a copy of the 1917 agreement pertaining to the construction of the Viaduct. All the maintenance work done on the original structure has been paid by the City and the parties signing the con-

tract or their successors have repaid to the City their proportionate part. In 1945 Public Service paid $24,000. City's Exhibit 6 is City Ordinance No. 5409, passed July 24, 1939, and pertains to the surrender of trackage to the City by Public Service.

When the matter of reconstructing the Viaduct was under consideration there was no objection to such reconstruction by any of the parties except Public Service which made strenuous objection as shown by its Exhibit 11.

Public Service has not operated streetcars over this Viaduct since 1950 but has operated motorbuses over same in accordance with the stipulation entered into between the City and said Company in 1954. Since 1950 Public Service has not used any part of the traffic space formerly used for streetcar operations and the tracks and ties have been removed. Public Service Exhibits 1, 2, 3 and 4 are photographs of the Viaduct, showing the condition of the structure within thirty days prior to the hearing.

Up to 1948 Public Service paid approximately $25,000 as its share of the cost of repairs to the original structure. In 1949 it no longer used the entire length of the structure for streetcars. At that time the Company was billed by the City for some $8,500. Public Service protested because it was not using the full length of the track space on the Viaduct and a reduced figure of $6,090.29 was later agreed to and paid. When Public Service no longer used the Viaduct it refused to make further payments, the last payment being made in May 1950.

As provided in the original 1917 agreement, it has been the custom for Kansas City to pay for maintenance and repairs on the original Viaduct and bill all the parties for

their share. The percentages of the total bill to the various railroads were as follows:

Terminal	11.70601
Frisco	10.09275
Santa Fe	3.84486
Connecting Railroad	3.84486
Burlington	3.84486

The Railways Company went into receivership on September 9, 1920. Public Service Exhibit 5 is a copy of an agreement between Kansas City and the receivers of the Railways Company dated March 4, 1921, together with copy of the Order of the Judge of the District Court of the United States for the Western Division of the Western District of Missouri, approving the agreement. The agreement provides for the payment of Railways Company's share and for the continued use of the Viaduct for streetcar service by the receivers and their successors.

The receivership lasted from September 9, 1920, until October 17, 1926. At a foreclosure sale under auction Public Service purchased the assets of the receivers and Railways Company. Public Service Exhibit 5 is a copy of the agreement between the receivers and Kansas City, dated March 4, 1921, and its Exhibit 6 is a copy of Ordinance No. 39719, dated March 7, 1921, approving the contract.

Public Service Exhibit 7 is a copy of Ordinance No. 11,764 dated May 10, 1948, authorizing Public Service to discontinue streetcar service over its existing Rosedale, Vine and 18th Street car line and to substitute motorbus service in lieu thereof. Public Service Exhibit 8 is copy of the acceptance by Public Service of the provisions of said Ordinance. The substitution of buses for streetcars

was allowed by this Commission in Case No. 11,312 [Not Reported] on June 4, 1948. Within ten days after such Ordinance and Order of the Commission Public Service proceeded to discontinue rail service from that portion of the Viaduct theretofore operated as the 18th Street car line.

Public Service Exhibit 9 is copy of Ordinance No. 14,036, passed September 25, 1950, authorizing Public Service to discontinue the Twelfth Street-Kansas Avenue Streetcar Line and to substitute motorbus and trolley bus service. Public Service Exhibit 10 is copy of the acceptance by Public Service of the provisions of said Ordinance. Public Service Exhibit 11 is copy of a letter from the Public Service Company to the Director of Public Works of Kansas City under date of September 21, 1953. This exhibit is an acknowledgment of a letter received concerning the work proposed to be undertaken by Kansas City for the rehabilitation of the Viaduct. In this letter Public Service disclaims any and all liability or responsibility for any costs involved in connection with that structure. Thereafter, Public Service refused to participate in any discussions or in the work on the Viaduct.

Public Service Exhibit 12 is a traffic count taken on April 20, 1955, and its Exhibit 13 is a traffic count taken on September 7, 1955.

Public Service Exhibit 14 shows the operation of the 18th Street Motorbus Line from September 9, 1954, to September 30, 1955, resulted in a net loss of $11,476 and that the operation of the Twenty-Third Trafficway and Holly Line across the Viaduct to Kansas during the same period resulted in a net loss of $7,752.00.

Kansas City's late filed Exhibit 6 is copy of an ordinance passed July 24, 1939, and accepted by Public Service July 26, 1939, pertaining to the discontinuance of street-railway service and substitution of buses.

After the resurfacing of Wyoming Street was completed in October 1950 Kansas City sent to Public Service a bill for $733.46 to cover what Kansas City considered as its share of the cost. Kansas City's late filed Exhibit 7 contains an affidavit of the Commissioner of Accounts for Kansas City that the records do not show this amount as having been paid.

No application has previously been made to this Commission for its approval of the original construction or the reconstruction of the Viaduct in question.

The railroad companies involved herein deny they are liable for any portion of the costs of reconstruction by reason of the presence of the railroad tracks under the Viaduct but agree that they are willing to pay one-third of the cost of such reconstruction in accordance with the original agreement between the parties pertaining to the construction of said Viaduct.

With the exception of Kansas City all of the parties connected with this matter contend that the Commission is without jurisdiction to pass upon the questions involved herein. Such objections were made throughout the case and rulings thereon were withheld with the reservation that they would be passed upon in connection with the merits.

A motion to dismiss or in the alternative to stay the proceedings was filed on July 5, 1956, by the railroad companies.

The Utilities Engineer of Kansas City testified relative to whether or not the presence of the railroad tracks under the Viaduct had anything to do with the reconstruction of the Viaduct. His testimony on this point is as follows:

"Q. The Santa Fe never requested that the city do anything about raising this ramp?

"A. No, sir, none of the railroads requested it.

"Q. The only reason you did it was because the engineers stuck the bridge up in the air and you had to get your viaduct up to it, wasn't it?

"A. That is correct.

"Q. The cost of raising that ramp to get up to that bridge wasn't in any way affected by the presence of the Santa Fe tracks, was it, the cost of doing the work? Is your answer no?

"A. The answer is no."

"Q. I will ask you the same question Mr. Parker asked with respect to the Santa Fe: Did the presence of Kansas City Terminal tracks at the location you described contribute in any way to the cost of the work done by the city on the 23rd Street Viaduct in 1954?

"A. No, I believe not."

"Q. Did the presence of the Kansas City Connecting Railroad Company tracks have anything whatever to do with the cost?

"A. They could have, Mr. Van Valkenburgh.

"Q. Did they?

"A. I don't know that they did. Merely because they were in the vicinity of the work it is possible they might have lightly contributed to an increased cost. I don't know that they did.

"Q. In what way? Would it be built the same way if they weren't there?

"A. Only in the handling of material and scaffolding.

"Q. There were other tracks under that portion, too, were there not?

"A. No, not under the reconstructed portion.

"Q. But you are unable to state whether or not there could have been or there was any added cost by reason of the tracks being there?

"A. All I can say, it could have been but I don't know there was."

"Q. Do you think the presence of the Frisco or Burlington tracks at the location under this Viaduct in any way contributed to the cost incurred in this 1954 improvement which is the subject of this case today?

"A. No, I don't believe they did."

CONCLUSIONS

[1] From time to time the Commission has been confronted with the question of approving or disapproving the construction of various structures which had been erected without authority of the Commission as required in Section 389.640 R.S. Mo. 1949. Without setting out numerous cases which support its position, the Commission will merely state that in its opinion it has jurisdiction in such matters and has jurisdiction in this case and all motions and objections made pertaining to the jurisdiction of this Commission will be overruled. The motion to dismiss or in the alternative to stay proceedings will also be overruled.

This is the first application which has been submitted to this Commission covering the construction or reconstruction of the Viaduct in question. The Commission is now requested to approve the reconstruction of the Viaduct and to allocate the costs between the parties. Based upon the evidence offered the Commission will approve such reconstruction, as it is evident that same was necessary.

[2] Regarding the costs involved in such reconstruction it will be necessary for the Commission to view the situation as it existed at the time of such reconstruction. At that time Public Service, with the consent and approval of Kansas City, had abandoned the streetcar tracks over which it had theretofore been operating streetcars. Therefore, the reconstruction which was necessary was not caused by reason of the tracks of said Company being on the Viaduct, and the Commission will, therefore, refrain from assessing against said Company any costs incurred by reason of such reconstruction. If Public Service is liable for any of the costs its liability would result from its contracts and operations pertaining to the Viaduct, and liability therefor, if any, would not come under the jurisdiction of this Commission.

[3], [4] We shall consider the allocation of the costs incurred in the reconstruction of the Viaduct between Kansas City and the railroad companies. The law is well settled that the cost of any construction can not be imposed upon a railroad company merely because it is a railroad company. The only basis for assessing a railroad company any portion of the cost of construction or alteration of a viaduct under Section 389.640 is the extent to which the presence of the railroad has made necessary or increased the cost of the improvement. There has been no showing that the cost of reconstruction work done in 1954 was caused by the presence of the railroad tracks. In fact, the testimony would indicate that these costs would have been necessary had the railroad tracks not been there. The construction of this Viaduct in the first instance was a joint undertaking of the parties to the original contract, including the railroad companies, avoiding making application to the Commission for its approval of such construction and of the allocation of costs as agreed upon and set

out in the contract. Thereafter, all of said parties continued in such joint venture both in the reconstruction of the Viaduct and in the maintenance thereof. The Commission believes it can be reasonably inferred from such action that the representatives of the railroad companies were of the opinion that they were, in fact, liable for a portion of the costs that might accrue in connection with the building, reconstruction and maintenance of the Viaduct, and attempted to fix the amount they should pay. The liability of the railroad companies in this case, if any, results from the contract and agreements relating to the original contract and the reconstruction of the Viaduct in question. In this case the railroad companies have agreed to pay for one-third of such reconstruction costs, to be paid in the following proportions:

Terminal	11.70601
Frisco	10.09275
Santa Fe	3.84486
Connecting Railroad	3.84486
Burlington	3.84486

In view of the admissions made in the record by counsel for all of the railroad companies involved to the effect that it will be agreeable to assess such railroad companies with one-third of the costs, the Commission will so order.

It is, therefore,

Ordered: 1. That the alterations and reconstruction of the Viaduct known as the Twenty-Third Street Viaduct in Kansas City, Missouri, made in 1954, at a cost of $113,112.64 be and the same is hereby approved.

Ordered: 2. That the cost of such reconstruction set out in "ORDERED: 1" hereof shall be borne as follows:

66.66666 percent by the City of Kansas City.

11.70691 percent by Kansas City Terminal Railway Company.

10.09275 percent by St. Louis-San Francisco Railway Company.

3.84486 percent by The Atchison, Topeka & Santa Fe Railway Company.

3.84486 percent by Chicago, Burlington & Quincy Railroad Company.

3.84486 percent by Kansas City Connecting Railroad Company.

Ordered: 3. That all objections and motions made pertaining to the jurisdiction of the Commission be and the same are hereby overruled.

Ordered: 4. That the motion to dismiss or in the alternative to stay proceedings filed on July 5, 1956, be and the same is hereby overruled.

Ordered: 5. That this Report and Order shall become effective on September 20, 1956, and the Secretary of the Commission shall serve a certified copy of same upon all interested parties.

Burton, Chm., Henson, McClintock, McDonald and *Barton, CC.*, Concur.

Office-Supreme Court, U.S.
FILED
JAN 5 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 846

KANSAS CITY TRANSIT, INC.,
Petitioner,

vs.

KANSAS CITY, MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

The jurisdiction of this Court is not properly invoked under 28 U.S.C., Section 1257(3), as will be shown more fully under the part hereof entitled "Argument," because no substantial federal question was properly presented to or decided by the Supreme Court of Missouri.

STATEMENT OF THE CASE

This matter was submitted to the trial court on motions for summary judgment filed by each party. This procedure is authorized by Missouri Supreme Court Rule 74.04. In support of their respective motions, the parties filed affidavits and exhibits by stipulation. The case as submitted to the trial court is contained in a part of the Transcript of the Record (R. 1-22) and in the exhibits (Plaintiff's Exhibits 1 through 13; Defendant's Exhibits A, B, and C). Based on this record the trial court overruled defendant's motion for summary judgment, sustained plaintiff's motion and entered judgment for plaintiff and against defendant (R. 23).

ARGUMENT

This Court will not review anything which was not presented to the state court for decision. *Hunter Company, Inc.* v. *McHugh*, 320 U.S. 222; *Wilson* v. *Cook*, 327 U.S. 474; *Pagel* v. *MacLean*, 283 U.S. 266; *Walters* v. *City of St. Louis*, 347 U.S. 231. Petitioner bases its argument herein on vehicle traffic counts over the viaduct in question (R. 137) and an affidavit to the effect that its franchise ordinance has expired (R. 186). The evidence regarding traffic counts was first presented in Petitioner's Reply Brief filed in the Supreme Court of Missouri. Evidence as to a franchise ordinance was not presented until Petitioner filed its Motion For Rehearing with the Supreme Court of Missouri (R. 178). None of this evidence was presented to the trial court and the trial court had no opportunity to decide Petitioner's constitutional argument based on this evidence. This was never presented in this case and was not before the state court for decision.

The only matters before the Missouri Supreme Court for review were those contained in the Transcript of the Record on Appeal (R. 1-34). The evidence of traffic counts and of franchise ordinances was not a part of that record and could not be considered by the Supreme Court of Missouri. *Phoenix* v. *Metropolitan Life Insurance Company*, 379 S. W. 2d 626 (Mo. 1964); *McCandless* v. *Manzella*, 369 S. W. 2d 188 (Mo. 1963); *Moore* v. *Mansfield*, 286 S. W. 353 (Mo. 1926); *Berghorn* v. *Reorganized School District No. 8*, 260 S. W. 2d 573 (Mo. 1953). It is obvious that the Supreme Court of Missouri in this matter correctly limited itself to the record as made and settled in the trial court (R. 176, 177). That the Supreme Court of Missouri was well aware of this is apparent from the following statement in its opinion regarding Petitioner's use of the viaduct:

> "While Transit built and maintained its tracks and operated streetcars, as the contract provided, its use of that part of the viaduct was indeed 'exclusive' but it was no doubt to its franchise advantage to surrender its tracks and that space to the city and to substitute buses for streetcars. And when it voluntarily made the substitution it necessarily used the viaduct in common with all other vehicular traffic including other types of common carriers of both persons and freight *but not upon this record* in derogation or infringement of its franchise rights." (R. 171; Emphasis added).

Because the Petitioner did not present to the state court for decision the constitutional question raised here, this Court should decline to exercise jurisdiction.

Petitioner contends that this Court should grant its Writ of Certiorari because the Missouri Supreme Court erroneously assumed Petitioner had a franchise. Petitioner bases this argument on an affidavit (R. 186) that its franchise ordinance had expired. Despite this, the fact